UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

SMYRNA READY MIX CONCRETE, LLC

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Cases 09-CA-251578
09-CA-252487
09-CA-255573
09-CA-258273

COUNSEL FOR THE CHARGING PARTY GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTER'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Submitted By
David O'Brien Suetholz
Pamela M. Newport
Counsel for Charging Party
BRANSTETTER, STRANCH & JENNINGS PLLC
515 Park Avenue
Louisville, KY 40208
Tel: (502) 636-4333
Email: davids@bsjfirm.com
pamelan@bsjfirm.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

NLRB Cases

Federal Cases

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

SMYRNA READY MIX CONCRETE, LLC	
and	Cases 09-CA-251578 09-CA-252487
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS	09-CA-255573 09-CA-258273

CHARGING PARTY'S POST-HEARING BRIEF

I. OVERVIEW OF THE CASE

This case can be described in one phrase. "Nip it in the bud." This is a classic case of an employer using tried and true methods to stop a union organizing campaign in its tracks. Smyrna Ready Mix Concrete ("Smyrna" or "Company") discharged the lead union supporter, discharged a supervisor who is related to that supporter and who refused to engage in unfair labor practices; promised and granted benefits to employees (literally trying to buy their loyalty); and finally, discharged all the remaining potential bargaining unit employees under the guise of a layoff. In actuality, the plant continued to run using employees from other locations. But Smyrna's goals were realized; its actions killed the organizing campaign. The Company ensured the union campaign could not get off the ground; it barely made it to the runway.

The hearing in this case was held before Judge Arthur J. Amchan. Complaint issued in this case on February 28, 2020, and amended Complaints were filed on April 20, 2020 and May

13, 2020.[1] The trial began on June 29 and concluded on July 15.[2] The evidence presented overwhelmingly supports the Charging Party's and General Counsel's position that Smyrna engaged in multiple unfair labor practices in order to stop its employees from organizing. Charging Party asks that the Judge find merit in all allegations and award the remedies requested in the General Counsel's Complaint, including reopening the Winchester location, reinstating all discharged employees, ordering a make-whole remedy, as well as a notice posting and reading.

II. RELEVANT FACTS[3]

A. Employees Engage in Protected, Concerted Activity and Begin a Union Organizing Drive

Smyrna provides ready-mix concrete, material hauling and concrete pumping services in several states, including in central Kentucky where it operates 15 plants. (TR. 20, 32-33) In 2017, Smyrna acquired three plants near Lexington, Kentucky: 1) Georgetown; 2) Nicholasville; and 3) Winchester. (TR. 31, 733) Winchester is the location at issue in this case and was originally owned by Central Ready Mix. (TR. 732-33)

Aaron Highley was the plant manager at Winchester at the time Smyrna took over, and he remained in that role. (TR. 32, 733) In 2018, Ben Brooks became the general manager for Smyrna's 15 central Kentucky plants, including the three Lexington-area plants. (TR. 685-686, 735)

In the summer of 2019, about 10 drivers, including nine mixer-operators and one tanker

[1] See, Cases 09-CA-251578, 09-CA-252487, 09-CA-255573, 09-CA-258273, Order Further Consolidating Cases, Third Consolidated Complaint and Notice of Hearing (May 13, 2020).
[2] The hearing was not held consecutively. The trial dates were June 29 and 30, July 1, 2, 13, 14, and 15.
[3] The facts are supported by the record in this case. The transcript to the hearing is cited as TR. __. The General Counsel's exhibits are cited as G.C. __. Respondent Smyrna's exhibits are cited as R. __. Charging Party Union's exhibits are cited as U. __.

driver, and two mechanics worked at the Winchester plant. (TR. 34-35, 739) Mixer-operators hauled loads of cement from the Winchester plant and were sometimes dispatched to other Central Kentucky plants. (TR. 40, 43, 291-292) In the summer and fall of 2019, it became commonplace for Highley to ask for volunteers to assist the Florence, Kentucky plant. (TR. 495, 540-41, 608, 744, 831, 1180) The drivers would "dead head," that is, drive an empty cement truck from Winchester to Florence, haul several loads in the Florence area, and then have to drive back to Winchester that same day. (TR. 608) The drive between Winchester and Florence was approximately an hour and a half to two hours each way. (TR. 40, 42-43, 230-231, 291-293) Frustrated with the Florence assignments, the drivers began discussing refusing to volunteer for some of these dispatching assignments. (TR. 120-121, 123, 231-233, 638-39, 679) However , no driver refused to travel to Florence if they were told they had to go. (TR. 425, 639-40, 746, 843, 1179) Highley told Brooks the drivers were upset with having to go to Florence all of the time. (TR. 179, 423) Brooks told Highley that if the drivers would not go to fire them. (TR. 793) At that point, the drivers began to discuss organizing a union. (TR. 50-51)

One driver, Sunga Copher, contacted the Union. Copher also happens to be Aaron Highley's nephew and the most senior driver in Winchester. (TR. 742, 1260) Copher spoke with International Teamsters organizer and senior Vice President John Palmer about his concerns at Smyrna. (TR. 342-45) Palmer met with Copher on about October 26, 2019 to discuss the process and gauge interest from Copher's coworkers. (TR. 345-47, 359) Copher told Palmer that he felt most of the other drivers would be interested, and the two set up another meeting for November 7. (TR. 349-50, 363)

The Winchester employees talked about the union campaign with each other. (TR. 50-55) In addition, Copher went to Highley to ask him what he knew about unions. (TR. 741-42)

Highley had previously worked at a union facility, but he did not know much. (TR. 741) Other employees, including Sheldon Walters and Charles Grimm, also mentioned the Union the Highley. (TR. 747-48)

Sometime after Copher's first meeting with Palmer, Copher was with Sheldon Walters and two Georgetown drivers, Donald Crow and Cantrell.[4] All of them were at the Florence facility at the time. (TR. 426-27) They all were discussing the drive to Florence, and Copher talked to them about things that joining the Union might help improve. (TR. 426-27) Copher called Palmer from the parking lot, and Palmer talked to the Georgetown employees, despite his concern that the employees' open discussion of the Union where others, including management, might be able to hear could lead to reprisal. (TR. 363, 426-27)

The next time Copher and Palmer met was on November 7, 2019. (TR. 365) This time, Sheldon Walters and Charles Grimm joined Copher and Palmer. (TR. 365-66, 428-30) Again, Palmer explained the process for creating a committee and gauging interest and support before moving forward. (TR 368, 428-30) Driver Nicole Long had originally said she would attend the meeting, but then changed her mind. While she told Copher she could not attend because it was late, Long testified that she was fearful of losing her job if she attended the meeting.

Around this same time, Long also went to the Georgetown facility and spoke with plant manager Roy Chastine and an employee named Jeff about the union meeting (TR. 1350) In addition, salesperson Chris Newell testified he heard this discussion and heard the mention of a "drivers only" meeting and a sign-in sheet. (TR. 1329, 1350,) Newell immediately reported this

[4] Nobody seemed to know Cantrell's first name. On some Company documents he is listed as "Cantrell, Cantrell."

conversation, including what he heard about the sign-in sheet to General Manager Ben Brooks. (TR. 1350, 1387, 1417-19)

B. Smyrna Responds to the Union Campaign by Firing Sunga Copher and asking Supervisor Aaron Highley to Spy on Employees

Sometime on November 8, 2019, Ben Brooks visited the Winchester facility (TR. 749, 1093) Brooks testified that he was on vacation from about October 12-19, and during this time, Relief Operations Manager James Goss called him to tell him that drivers from Winchester had not shown up to a pour at the Taylorsville facility. (TR. 1087-88) At some point after returning from vacation, Chris Newell told Brooks that one of the drivers who did not show up to Taylorsville was Sunga Copher. (TR. 1092, 1176, 1370, 1407)

Brooks received a call from Newell while in the parking lot at Winchester.[5] (TR. 1093-94) Newell informed Brooks that he had heard drivers in Georgetown discussing a "drivers only" meeting with Long. (TR. 1093-94, 1349-50, 1387-88, 1413-14, 1419) Brooks told Newell he would "find out" what it was about. (TR. 1094) Brooks found Highley and asked him about the meeting.[6] (TR. 749, 1095, 1268) Highley told Brooks the drivers could not have had any such meeting at the plant, since they would not have been able to get into the facility. (TR. 749) Brooks told Highley he heard Copher was involved. (TR. 749-50) Brooks asked Highley to find out more about the meeting the drivers had and report back to him. (TR. 1268) Specifically, Brooks told Highley to provide him with names of employees involved in the union effort. (TR. 750, 753) Brooks further said he would "get to the bottom of it." (TR. 750) Highley spoke to Copher and told him Brooks had received a call about union activity, believed that Copher was

[5] Brooks testified that he went to Winchester because of the complaint he got while on vacation regarding drivers not reporting to Taylorsville. (TR. 1093)
[6] Brooks testified he only asked about a "drivers only" meeting. Highley testified Brooks asked about a union meeting.

involved, and wanted Highley to find out what was going on. (TR. 58-59)

Brooks then left Winchester and drove to Georgetown. (TR. 1096) At Georgetown, Brooks spoke with plant manager Roy Chastine and asked him what he knew about the "drivers only" meeting. (TR. 1097) According to Brooks, Chastine replied, "The only thing I know about Winchester is there's a couple drivers up there that are making it difficult on the others." (TR. 1097)

Brooks then traveled to the Nicholasville facility. (TR. 1098) At Nicholasville, Brooks asked plant manager Jason Stott what he knew about the "drivers only" meeting. (TR. 1098) Stott testified that his drivers told him at some point that Copher had tried to get them to "buck with him." (TR. 1024-25)

Later that same day, Brooks called Highley to see if Copher had returned to the Winchester facility. (TR. 750, 1101) Brooks told Highley to keep him there until he arrived. (TR. 750, 1101) When Brooks got to Winchester, he approached Copher. (TR. 1101) Copher recorded the conversation (R. 90 (audio recording)) This was the first time Copher and Brooks had met. (TR. 1190) Copher told Brooks that Highley had questioned him about the Union. (R. 90) Brooks stated he was there "about some other things too." (*Ibid.*; TR. 61) Brooks proceeded to fire Copher, citing poor work performance and a negative attitude. (R. 90; TR. 1101) Brooks stated he had some complaints against Copher but refused to tell him the nature of the complaints or who had made them. (R. 90; G.C. 2; TR. 61) Copher was shocked, stating he had never been disciplined, always stayed late, came in early, and generally did whatever was asked of him. (R. 90; TR. 1190-91) Copher left and informed Highley he had been terminated. (TR. 751) Highley expressed his disapproval to Brooks, stating that Copher was one of the best drivers he had and asked, "is that really the best you could come up with?" (TR. 751) Brooks responded it

was all he could think of right then, but "we are not going to try to run a company with our hands tied behind our back. I will shut this plant down first." (TR. 751-752)

C. Smyrna Promises Benefits to Employees and Pays Employees $100

A week after Copher's discharge, on November 15, 2019, Brooks conducted a meeting at the Winchester plant. (TR. 186, 557, 1109) Immediately prior to the meeting, Brooks commended Highley's performance as a supervisor at the plant. (TR. 648-649) Brooks also praised the employees for their hard work. (TR. 306-307) He announced that drivers would no longer need to travel to the Florence plant because staffing had been improved at Florence. (TR. 186, 189, 434, 559, 646-647) Brooks also told employees they could come to him if they had issues and then concluded the meeting by handing each employee $100 in cash. (TR. 434, 561, 647, 759-61, 1110-1112) Brooks had never given such a "cash bonus" to employees at Winchester before. (TR. 47, 186-187, 307, 434, 1197) He called the gesture a "hundred dollar handshake" intended to "boost morale." (TR. 1111-12)

D. Smyrna Fires Aaron Highley

Three days after this meeting, on Monday, November 18, 2019, Brooks visited Highley at Winchester. (TR. 760) Brooks told Highley that he "gave [him] a week" but Highley had failed to get him "a list [of union supporters]." (TR. 761) Brooks then discharged Highley, stating that Smyrna was taking the plant in a different direction. (TR. 761)

E. The Employer's Actions Chill the Union Organizing Campaign

Copher's termination, followed by Highley's abrupt departure, put an end to all organizing efforts. (TR. 379, 432) Immediately following Highley's termination, one employee quit. (TR. 304) Another employee quit shortly thereafter. (TR. 192) Employees stated "nobody talked about it anymore. We didn't want to risk our jobs." (TR. 432) All the drivers got very

nervous. Even Highley's replacement, James Goss, sensed that drivers were scared "because they just got through getting rid of that Copher guy, and then they got rid of Aaron . . . so maybe they thought they could be next." (TR. 957)

F. Smyrna Reduces Operations at the Winchester Facility and "Lays Off" the Rest of the Drivers

Following Copher's and Highley's terminations, Brooks began visiting the Winchester plant more frequently – several times per week. (TR. 302, 426, 554, 738, 1345) Previously, he visited sporadically, once every few months. (TR. 48-49, 185, 425-426, 737) Goss and Newell came to the facility almost every day after the terminations. (TR. 1373) Concrete yardage sold by the plant had doubled from 2018 to 2019. (TR. 174, 185-186, 438, 765; G.C. 26 and 27) Yet, around January 7, 2020, Brooks told the remaining six drivers that the plant would be closing, and they would be laid off and given two weeks' severance pay. (TR. 173-174, 196, 440, 566-567, 570, 656, 659; G.C. 26, 27) At that time, Brooks did not place any conditions on receiving the severance. (TR. 659)

On about January 10, 2020, Brooks told the drivers they would be eligible to be rehired in the spring when the plant reopened, though they would lose their seniority and have to reapply like anyone else. (TR. 196-197, 199, 203, 664) Brooks provided several reasons for the closing, including that business was slow and that repairs were needed at the plant. (TR. 197, 567, 572-573, 665) Brooks also explained that, rather than receiving two weeks' pay, employees could receive four weeks' pay if they signed a separation agreement. (TR. pp. 570, 663) The drivers believed they had to sign the agreement in order to get any severance. (TR. 666)

On Monday, January 13, 2020, the terminated drivers reported back to the plant to sign the separation agreement. (TR. 197, 574, 663) The separation agreement included, among other things, a broad covenant "not to persuade or instruct any person to file a suit, claim, or complaint

with any state or federal court or administrative agency" at the risk of having to pay damages and attorney's fees for any breach. It also contained the following provisions:

> Non-disparagement. Employee agrees that, following Employee's termination of employment, Employee will not disparage or speak unfavorably about [Smyrna] . . . to third parties or in public or otherwise take any action or make any comment whatsoever that would harm, injure, or potentially harm or injure the goodwill of [Smyrna]…
>
> Covenant not to Reapply. Employee hereby agrees that he/she will neither apply for nor accept a position of employment with the Company, or any of its business units, subsidiaries, or affiliates. (G.C. 3, 4, 10, 11, 20, 21)

The six drivers reviewed the agreement while they were assembled at the plant. (TR. 197-198, 661-662) All six signed the agreement and received four weeks' pay. (G.C. 3, 4, 10, 11, 20, 21)

After discharging the six remaining drivers, Smyrna did not fully shut down the plant as it had told employees. Instead, Smyrna converted the Winchester facility to an "on demand" plant that operates as needed to service customers close to Winchester. (TR. 67-70, 922-923; G.C. 28) Other drivers now travel from the Georgetown and Nicholasville plants, as often as twice a week, to assist at Winchester. (TR. 72-73, 724) Additionally, work that used to be dispatched from the Winchester area is now being dispatched from the Georgetown and Nicholasville plants. (TR. 724) The two Winchester mechanics also continue to work at Winchester. (TR. 445, 667, 723-724)

III. ARGUMENT

A. Legal Standard

Under Section 8(a)(1) of the Act it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. 29 U.S.C. §158(a)(1). Those rights include the right to organize, to form, join, or assist a labor

organization, to bargain collectively, to engage in other concerted activities for mutual aid or protection, or to refrain from any or all of these activities. 29 U.S.C. § 157. This is a broad prohibition on employer interference. An employer may not discharge, constructively discharge, suspend, layoff, fail to recall from layoff, demote, discipline, or take any other adverse action against employees because of their protected, concerted activities.

Under Section 8(a)(3) of the Act, it is unlawful for an employer to retaliate against union or other protected, concerted activity. To establish a prima facie case of retaliation or discrimination under Section 8(a)(3), the evidence must establish four elements:

1) the employee was engaged in protected activity;

2) the employer had knowledge of that activity;

3) the employer showed animus related to that protected concerted activity; and

4) the protected activity was a motivating factor for the adverse employment action. See, *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *AdvancePierre Foods*, 366 NLRB No. 133, slip op. at 16 (July 19, 2018).

An employer does not violate Section 8(a)(3) when it would have taken the same action for legitimate business reasons. *Wright Line* at 1089. But it is not enough for the employer to simply produce a legitimate basis for the adverse employment action or to show that reason factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Rather, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun Int'l*, 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line* and rejecting employer's claim

that its burden in making out an affirmative defense is met by demonstration of a legitimate basis for the adverse employment action). The Board may infer animus from the employer's pretextual reasons. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019); *DHL Express*, 360 NLRB 730 (2014). Certainly, where the surrounding facts support it, the Board may assume an unlawful motivation was causally connected to the adverse action. *Electrolux* at 3.

Evidence that a discriminatory motive that "contributed to" an employer's decision to take adverse action against the employee may include: (1) statements of animus directed to the employee or about the employee's protected activities (see, e.g., *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1 (Dec. 30, 2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge striking employees and then disciplined a remaining striker following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (see, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment, shifting explanations for the adverse action, failure to do a thorough investigation, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 360 NLRB No. 43 (Feb. 20, 2014); *ManorCare Health*

Services – Easton, 356 NLRB No. 39, slip op. at p. 3 (Dec. 1, 2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

B. Smyrna unlawfully discharged Sunga Copher.

It is undisputed that Sunga Copher initiated the union organizing drive. He talked to union representatives and to other employees about unionizing. Copher also brought the drivers' frustrations about traveling to Florence to management's attention.

Smyrna's knowledge of Copher's union activity is well-evidenced. Smyrna supervisor Chris Newell heard Winchester driver Nicole Long discussing a "meeting" the Winchester employees had the night before, as well as a "sign-in sheet."[7] (TR. 1350) One of the people Long was discussing this with was Georgetown plant manager Roy Chastine. (TR. 1687-89, 1350) Newell felt he needed to report the meeting immediately to Brooks, which he did, and he specifically told Brooks about the sign-in sheet, stating "I didn't think they would be eating pizza and beer when I heard the sign-in sheet thing." (TR. 1413, 1419-20) Brooks told Newell to report back to him if he heard anything else. (TR. 1421) Based on this information, Brooks continued his investigation into this meeting, questioning Highley, as well as Roy Chastine in Georgetown who told Brooks he knew there were "a couple drivers up there that [were] making it difficult on the others." (TR. 1097) Brooks then questioned Nicholasville plant manager Jason

[7] While Long testified she could not remember talking about a sign-in sheet on that particular day, she did remember it coming up at some point. It is likely that she did bring up the sign-in sheet since both Newell and Brooks testified to that, and it makes sense given the ensuing sequence of events. Hearing about a "sign-in sheet" only makes it more likely that the Company had knowledge of protected, concerted or union activity; therefore, Newell's testimony does not help the Company's position and should be believed. (TR. 1417-19)

Stott to find out more information about the meeting. (TR. 1098) Stott testified that his drivers told him that Copher tried to get them to "buck with him." (TR. 1024-25) Stott told Brooks about this. Stott's exact words were "Ben asked me" before trailing off, and then he stated he told Brooks because "[t]hose guys were stirring the pot." (TR. 1025) And when Brooks met with Copher to fire him and Copher mentioned the union, Brooks did not say "I don't know what you're talking about," or "I shouldn't be talking to you about that." Brooks responded by telling Copher, "eehhh . . . I'm here about other things *too*." (R. 90) Brooks' explanation for his use of the word "too" – that he was linking the work performance with the negative attitude – makes no sense in that context. Rather, Brooks' response is exactly the kind of response one would expect from a supervisor who is treading lightly and attempting to cover up the actual reason for a discharge. This is further bolstered by the fact that Brooks "forgot" that Copher mentioned the Union in that meeting and did not include it in his affidavit. (TR. 1105-06) Even accepting the farfetched premise that a general manager would forget when one of his employees mentions the word "union," the union activity and alleged retaliation for that activity was the entire reason Brooks was giving his affidavit. Brooks' explanation is simply not credible.

The more believable scenario is that Brooks knew about the union campaign, knew Copher was involved, and told Highley he knew about it. By his own admission, at the very least, Brooks asked Highley to investigate who else was involved in the "drivers only" meeting, so that he could try and "fix it." (TR. 1268). This is at least an admission of knowledge of protected, concerted activity and direct evidence of an intent to interfere with that activity. Though Brooks denies asking Highley about union activity specifically or asking for a list of employee names, Highley's testimony in this regard lines up with Brooks' rationale for traveling to Nicholasville and Georgetown that day and then firing Sunga Copher immediately after.

Brooks' comment to Highley that he would shut the plant down rather than deal with a union, and his instructions to Highley to surveil and interrogate employees, show Smyrna's animus against the organizing drive. When evaluating the element of union animus, it is unnecessary to show "a particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4, fn. 10 (September 4, 2015); *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (September 15, 2017) ("we emphasize that such a showing is not required"). The timing of Copher's discharge – the day after he arranged and attended an organizing meeting with a union representative, which Brooks was aware of – makes the unlawful motivation "stunningly obvious." *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 959-960 (2d Cir. 1988); see also, *Kentucky Gen., Inc. v. NLRB*, 177 F.3d 430, 436-37 (6th Cir. 1999) (short time lapse between employees' union activity and layoff, as well as employer awareness of employees' union activity, bolsters finding that layoffs were discriminatorily motivated); *NLRB v. Sutherland Lumber Co.*, 452 F.2d 67, 69 (7th Cir. 1971) ("The abruptness of a discharge and its timing are persuasive evidence as to motivation."). Moreover, at Brooks' direction, Highley unlawfully interrogated Copher about his and others' union activities when he questioned Copher on November 8, 2019 – the same day that Brooks terminated him. See, e.g., *Los Angeles Airport Hilton Hotel and Towers*, 354 NLRB 202 (2009) (interrogation of employee about attendance at union meeting unlawful, as was another interrogation that occurred in context of warning being given for participating in protected concerted activity).

Smyrna argues it fired Copher for poor work performance and a negative attitude. (TR. 1101; R. 90) Smyrna claimed that drivers Nicole Long and Sheldon Walters had complained to

management about Copher, but both of them refuted this.[8] (TR. 1684, 1696) Brooks also alleged a customer complained about Copher but could not name the customer and did not document the complaint. (TR. 1173) The Company also cited the "Taylorsville incident," where Smyrna alleges Copher failed to show up to a large pour in Taylorsville, as a reason for discharge. (TR. 932, 1176) The evidence revealed that even if this incident occurred, there were *two* drivers involved. (TR. 932, 1174, 1194) Yet, Brooks never investigated to identify or discipline the second employee. (TR. 1176-77. 1194) Most incredibly, Brooks testified Copher was "stealing time." (TR. 1188-89) However, the only documents he reviewed to verify such a serious allegation were a few timecards for Copher.[9] (R. 59; TR. 1188-89) But, Brooks did not review how many loads Copher was taking to Florence or pull his truck reports.[10] (TR. 1187) And Brooks never mentioned stealing time as a reason for discharge when talking to either Copher or Highley. (TR. 1189) Such shifting reasons and unsubstantiated explanations support a finding of pretext and unlawful discrimination. See, *NLRB v. Lakepark Indus., Inc.*, 919 F.2d 42, 45 (6th Cir. 1990); *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988); *NLRB v. Schill Steel Prods., Inc.*, 340 F.2d 568, 573 (5th Cir. 1965) ("vacillation and multiplicity of

[8] Walters admitted to complaining to another driver Scott Keaton about Copher at times, but this was just talk, and Walters acknowledged Copher was in the yard more than the others because he knew more. (TR. 1699) Even Ben Brooks testified about complaints being just "drivers talk." (TR. 1186)

[9] The Company submitted R. 59-66 as examples of time cards Brooks reviewed, but Brooks testified he did not remember if he reviewed all of them and could not remember all of the other employees he may have reviewed, though he believed he reviewed Long's and Walters' time cards. (TR. 1182-83) Therefore, this exhibit should not be given much weight in terms of supporting the Company's reason for discharge.

[10] It should be noted that even if Brooks had reviewed the trips to Florence, that probably would not have been accurate. The Company submitted R. 74 purporting to show the number of trips to Florence and other facilities for each truck. Yet, Long, Walters, Copher, and Highley all refuted the accuracy of this exhibit, noting that trips and locations were missing from these reports. (TR. 1686-87, 1693-95, 1704-05, 1709-11)

alleged reasons" for termination "render [employer's] claims of nondiscrimination the less convincing").

Furthermore, Smyrna violated its own progressive discipline policy when it terminated Copher. While the progressive discipline system incorporates a verbal warning, written warning, and suspension before resorting to discharge, Smyrna fired Copher without issuing any prior discipline or even making him aware there may have been a problem. (TR. 1175, 1261, 1266) Additionally, the Company veered from its normal practice of notifying the plant manager before terminating an employee. (TR. 737) Highley knew nothing about Copher being discharged until after it happened. (TR. 737) See, *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995) (confirming that employer deviation from past practice may be a basis to infer discriminatory motive). And Brooks has *never* fired another driver for any of Copher's alleged violations. (TR. 1193)

Smyrna argues that it now has evidence that, had it known about at the time, would have resulted in Copher's termination. Specifically, Smyrna has accused Copher of violating its no-call, no-show policy. (R. 80) These absences were legitimate, however, and no discipline was issued because Copher was able to bring in documentation from his medical provider. (TR. 1069) Copher explained all of the absences the Company questioned him about. Copher had been in the hospital after a car wreck on July 7. (TR. 1718) On August 9, he had had surgery after the lower part of his intestine on the left side wrapped around another part. (TR. 1719) In November 2018, Copher had the flu. (TR. 1718) In December 2018, Copher had food poisoning. (TR. 1720) The Company has no evidence to dispute Copher's justifications, nor can Copher be penalized for taking sick days he is entitled to. Copher brought in doctor notes to cover the absences. (TR. 1711-12) In other words, Smyrna cannot prove that it actually *would have*

terminated Copher had it known about these incidents at the time. See, *McKennon v. Nashville Banner Publishing Co*., 513 U.S. 352, 362-63 (1995); *Marshall Durbin Poultry Co*., 310 NLRB 68, 70 (1993), enforced in relevant part, 39 F.3d 1312 (5th Cir. 1994). "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *Nashville Banner*, at 362-63. The Company cannot show that Copher violated its policies in such a way to require termination or that it would have actually terminated him at the time.

Smyrna's justifications for Copher's discharge are contrived – a transparent pretext to try and distract from the real reason it terminated Sunga Copher – to retaliate against him for exercising his rights under the Act and to prevent his coworkers from continuing down the same path. *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 226-27 (6th Cir. 2000) (absenteeism was pretextual basis for discharge where employee was not previously warned, there were no irregularities or unexcused absences, and employer falsely testified that he was absent on a particular day).

C. Smyrna unlawfully discharged Aaron Highley

Smyrna likewise violated the Act when it unlawfully discharged Plant Manager Aaron Highley. An employer violates Section 8(a)(1) when it terminates a supervisor for refusing to commit an unfair labor practice. See, *USF Red Star Inc. v. NLRB*, 230 F.3d 102, 106 (4th Cir. 2000) ("Although supervisors are not explicitly covered by the NLRA, [Section 8(a)(1)] is violated if a supervisor's discharge resulted from his refusal to commit an unfair labor practice) (citing *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 404 (1982), *enforced sub nom. Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983)).

If Highley had complied with Brooks' request to provide him with the names of employees involved with the union effort, gathering and submitting names of union supporters to Smyrna would have constituted unlawful interrogation and surveillance of employees' Section 7 activity. See, e.g., *Astro Shapes, Inc.*, 317 NLRB 1132, 1133 (1995) (unlawful surveillance for supervisor to park in tavern parking lot where union meeting was scheduled because he was curious how many employees would show up); *Dadco Fashions*, 243 NLRB 1193, 1198-1199 (1979) (unlawful surveillance for supervisor purposely to drive by union's roadside park highway meeting "because she was curious"), *enforced*, 632 F.2d 493 (5th Cir. 1980).

The Company maintains that it had legitimate reasons to fire Highley, but none of them pass the smell test. One incident involves Chris Newell's contention that Highley had failed to timely pour a wall. However, the customer Newell testified about was his personal friend. (TR. 1396) And, upon cross-examination, Newell admitted that the long wall Highley was pouring at that time had to take priority, given the risk of a "cold joint" forming and causing the wall to have to be repoured. (TR. 1398-99) In any event, Highley's team was only 45 minutes late to Newell's friend's job, which Newell admitted was "timely" before being led to answer differently by counsel. (TR. 1335, 1400) Furthermore, Newell has no authority over Highley. (TR. 1364) Aaron Highley had the authority to run his plant and send his drivers where they needed to go in accordance with his schedule. In fact, Highley was one of the only central Kentucky plant managers to take his own orders. (TR. 968) In terms of "mismanagement," Smyrna had never disciplined Highley for anything, much less anything indicating poor oversight of his plant. (TR. 1201-02) Smyrna did not warn Highley that he was not meeting his goals or that he could be terminated if he did not meet certain goals. (TR. 1201-02) On the contrary, Ben Brooks evaluated Highley each year and authorized his raises. (TR. 740) Simply

put, Smyrna's claim that it terminated Highley because of his alleged poor management of the Winchester plant is highly dubious. See, *NLRB v. Oakes Mach. Corp.,* 897 F.2d 84, 93 (2d Cir. 1990) (finding discharge of supervisor unlawful where employer claimed the termination was based on poor oversight of employees rather than the supervisor's threat to testify against the company in support of an employee's NLRB charge) (citing *Wright Line*, 251 NLRB 1083 (1980), supra.)

Moreover, while Smyrna maintained that the Winchester facility was doing poorly compared to other plants, the evidence establishes that yardage of concrete produced at Winchester had almost doubled between 2018 and 2019. (TR. 174, 185-186, 438, 765; GC 26 and 27) And while Smyrna has tried to move the focus to "efficiency," plant managers do not control wages, and they do not control the price of concrete. (TR. 1232-33) Highley did his job in getting the concrete out the door, in spite of the fact that he was sending his drivers to assist at other facilities almost every day. (TR. 1704-06) The Company had even recently decided to give Highley brand new trucks – trucks that Jason Stott in Nicholasville highly coveted. (TR. 1205-06) If there was not enough work, or if Highley was grossly inefficient and eating into Smyrna's profit margin, it would not have increased the number of trucks in Winchester.[11] Ben Brooks would not have granted full pay raises to Highley. Smyrna's stated rationale for firing Aaron Highley cannot pass muster.

Brooks' statement to Highley moments before terminating him, that he had "given him a week to give him a list of names," reveals the Company's animus and the true reason for the

[11] Much was made about the financial reports and the EBITDA. (See generally, testimony of J.D. Alsup; R. 9) However, based on the Company's admissions that the financial reports are "normalized" in a way that removes a variety of factors from being tconsidered their veracity and reliability is highly questionable. (TR. 1473-78)

discharge – Highley refused to surveil and interrogate employees' about their union activities and report them to Smyrna. And even though Brooks denies this, the unemployment paperwork in Highley's case, submitted by Brooks' wife, supports Highley's allegations. (U 13; TR. 1272-73) The unemployment documents state the Highley received a "verbal coaching" on November 11, 2019 and then was terminated a week later. (U. 13) First, a "coaching" is not discipline. And while Highley testified that Brooks first told him to get "a list" on November 8, the relevant dates given on the unemployment documents – November 11th and 18th – corroborates Highley's testimony that, on the day he was terminated, Brooks stated he had "given him a week." (TR. 761) The timing of Highley's termination – only 10 days after he voiced disapproval of his nephew Copher's abrupt termination along with Brooks' statement that he would rather shut down the plant than allow it to unionize – further demonstrate Smyrna's antiunion motivation in getting rid of Highley. See, *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995) (listing variety of factors from which discriminatory motivation can be inferred, including proximity in time to union activities).

Termination must stand or fall on the reasons given at the time it terminated Highley. And the *only* reason Brooks gave to Highley for his termination was that the Company was "going in a different direction." (TR. 1201) Brooks never informed Highley of any complaints or told him he had mismanaged his facility. (TR. 1249-50, 1703) Frankly, how could he? Highley had increased the concrete yardage from Winchester by a greater percentage than any other plant in Brooks' jurisdiction. This alone is sufficient reason to infer the Company's rationale is a complete fabrication.

Smyrna has alleged, as an affirmative defense, that it uncovered an independent basis for

Highley's discharge.[12] But, as is the case with Copher, Smyrna cannot prove that it actually would have terminated Highley had it known about these incidents at the time. See, *Nashville Banner, supra*; *Marshall Durbin, supra.* Smyrna alleges Highley failed to inform Brooks of a vehicle accident involving Copher, and that his failure-to-report was a terminable offense. (TR. 106-108, 832-834) The accident in question occurred in 2017, before Brooks' tenure as general manager, and Highley did in fact report the accident to Brooks' predecessor, James Goss. (TR. 834-838) Goss instructed Highley that he did not have to move the report up the chain if it was easily fixable and, pursuant to Goss's direction, Highley wrote an incident report and kept the report in his own on-site records. (TR. 834-838) Thus, the evidence demonstrates that Highly reported the accident and documented it as instructed.

The Company also intimated that Highley could have been discharged for failing to terminate Copher after Copher's alleged no call-no shows. However, Highley testified that he documented them but concluded they did not warrant discipline since Copher always had a doctor's note. (TR. 1069, 1711-12) Smyrna has not terminated any plant manager for similar conduct, and other managers who have been accused of more serious misconduct have been simply demoted or suspended. (TR. 930, 1207-08) Smyrna's after-acquired evidence cannot now serve as a legitimate basis for discharging Highley, nor should it serve to limit reinstatement or backpay.

It is clear that Smyrna terminated Highley because he refused to participate in Smyrna's unlawful scheme to identify and target union supporters. Highley's relationship to Copher – the lead union supporter – was also clearly a significant factor in the decision to terminate him. The Company introduced evidence about Copher and Highley's relationship, presumably to highlight

[12] Second Amended Answer to Third Consolidated Complaint.

favoritism or to downplay any unlawful interrogation by Highley. (TR. 1057-59) But this evidence instead supports the premise that, in Smyrna's eyes, Highley was guilty by association. *Cf. Tasty Baking Co. v. NLRB*, 254 F.3d 114, 127-28 (D.C. Cir. 2001) (affirming that an employer violates Section 8(a)(1) when it takes employment action against a supervisor in retaliation for a relative's union activities) (citations omitted). Smyrna had never disciplined Highley before his termination or informed him his performance was lacking. (TR. 1201-02, 1249-50, 1703) In fact, Ben Brooks had just praised Highley and the plant's performance at the November 15th meeting. (TR. 648-49) Smyrna took no action to address Highley's alleged mismanagement until *after* it learned of the union campaign and considered the family relationship between Highley and Copher. Firing Highley was simply part of the "plan to thwart [employees'] self-organizational activities." *Southern Pride Catfish*, 331 NLRB 618, 619-620 (2000).

D. Smyrna unlawfully promised a grant of benefits, and did grant benefits, to employees at the November 15, 2019 meeting.

An Employer's promise to grant economic benefits to employees during an organizing campaign, even though unconditional, may interfere with the protected right to organize, thereby constituting a violation. *NLRB v. Exchange Parts Co*. 375 U.S. 405, (1964); see also *St. Thomas Gas*, 336 NLRB 711, 720 (2001). An ongoing union organizing campaign does not require that the union have filed a representation petition. See *Flamingo Las Vegas Operating Co*., 359 NLRB 98, slip op. at 1 n.3, 12 (2013). In determining the legality of a grant of benefits during a union organizing campaign, "the Board will examine the size of the benefit conferred, the number of employees receiving it, the timing of the benefit, and how employees reasonably would view the purpose of the benefit." *In Re Star, Inc.*, 337 NLRB 962, 963 (2002). Other unlawful conduct by the Employer may also reveal the motive behind a grant of benefits. The

Board draws an inference of improper motivation from all the evidence presented and from the employer's failure to establish a legitimate reason for the timing of the benefit. *Holly Farms Corp*., 311 NLRB 273, 274 (1993); see also *Manor Care Health Services — Easton*, 356 NLRB No. 39, slip op. at 21 (2010) ("Absent showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.").

A week after unlawfully terminating Copher, Brooks gathered the drivers together and told them that they would no longer be required to drive to Florence (the very condition that sparked their interest in unionizing and gave them each $100 in cash – literally attempting to buy their loyalty. (TR. 1111) Such seemingly beneficent gestures violate the Act when taken in response to union activity - a "fist inside of a velvet glove" designed to unlawfully entice employees away from organizing activity. See, *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Furthermore, Brooks' violated the Act when he told drivers they could come to him if they had issues, implying that the employer would grant additional improved terms and conditions of employment if employees refrained from engaging in further union organizing activity. See, *Doane Pet Care*, 342 NLRB 1116 (2004) (telling employees that issues raised by those employees during a union campaign would be looked into found unlawful); *Majestic Star Casino*, 335 NLRB 407, 408 (2001) (employer's statement that it would look into employees' concerns found unlawful).

The fact that Smyrna, and Brooks specifically, held meetings in the Company's past where $100 cash bonuses may have been distributed does not affect the analysis. These bonuses did not occur "on a continuing or regular basis." *Dmi Distribution of Delaware, Ohio, Inc.*, 334 NLRB 409, 410 (2001). Brooks testified that since taking over in 2018, the November 15, 2019

meeting was the first "safety" meeting he had at the Winchester facility – the first one in more than a year. (TR. 1197) And Brooks had never given these cash bonuses to drivers at Nicholasville or Georgetown. (TR. 1000-01, 1198-99) The Company cannot explain away the timing of this "hundred dollar handshake.' (TR. 1111) Brooks admitted that he held the meeting specifically to address employee concerns and to "fix" any problems if he could. (TR. 1268) Brooks already knew that employees were unhappy with having to travel to Florence, which he specifically addressed in the meeting. (TR. 1111) In Brooks' words, the $100 cash bonus was a "morale booster." (TR. 1218) The November 15th meeting was designed to make the drivers feel they did not need a union because Smyrna would fix their problems. It was a thinly veiled attempt to quash the organizing campaign.

E. Smyrna violated the Act when it terminated the rest of the driver operators and transitioned the Winchester plant to an "on demand" facility.

The most coercive and destructive act an employer can commit is to close a plant to thwart a union organizing drive. The chilling effect of an illegal plant closure not only affects the employees exercising their Section 7 rights, but spreads to other employees, even those at unrelated facilities and employers – like a virus. And of course, this is by design. The employer's sole purpose is to terrify other employees and warn them of the consequences of forming a union. The impact of an illegal plant closure cannot be overstated.

In this case, Smyrna used this weapon effectively. And it did not stop with shutting down Winchester. Smyrna also required its employees to sign a separation agreement that grossly infringed on their rights to engage in protected activity and keep them from discussing what happened to them with anyone else, including its other employees.

i. Terminating the Winchester drivers and converting the location to an "on demand" facility was a ruse designed to kill the union organizing campaign.

Smyrna culminated its plan to prevent Winchester from becoming a union facility with its decision to transform Winchester to "on-demand" status and lay off the six remaining drivers. This action swiftly and decisively rid its workforce of employees sympathetic to the union campaign and served as an example to its drivers in Georgetown, Nicholasville, and elsewhere. See, *NLRB v. G&T Terminal Packaging, Co., Inc.*, 246 F.3d 103, 117 (2d Cir. 2001) (enforcing finding that employer's decision to dismantle part of its operation and permanently lay-off portion of workforce was motivated by employees' union activities as opposed to long-term profitability concerns) (citations omitted). See also, *Lear Siegler, Inc.*, 295 NLRB 857, 859 (1989) (applying *Wright Line*, supra, to find that the employer violated Sections 8(a)(3) and (1) when it effectively ceased operations at one facility, transferred work to another facility, and laid off bargaining unit members because they pursued union representation).

The Company's knowledge of union activity, and the continued threat of a campaign even after Copher and Highley were gone, cannot be ignored. Chris Newell knew the drivers were disgruntled. (TR. 1415). Newell admitted hearing the drivers talk about the union after taking over the facility. (TR. 1418-19, 1422) James Goss also admitted he overheard these conversations. (TR. 955-56, 1421-22) Goss heard drivers say that the "drivers only" meeting was actually a union meeting, and he admitted, albeit hesitantly, that he knew the driver who had started the campaign was Copher. (TR. 955-57) Ben Brooks was also at Winchester when some of these conversations occurred. (TR. 1432) In fact, Newell, who repeatedly made reports to Brooks about employee developments, testified he did not need to report this activity because he "assumed that the people that needed to know about the union conversations were aware of it."

(TR. 1432-33)

Smyrna has tried to portray itself as a company that harbors no anti-union animus. Company witnesses of course insisted they had no problem with the union. It "didn't matter" to Jeff Hollingshead if a plant was union. (TR. 1626-27). Ben Brooks' father-in-law is a retired Teamster, and as such, Brook's wife received a Teamsters scholarship. (TR. 1073) But when Brooks found out that his Winchester employees were talking about a union, he certainly did not tout college scholarships as a union benefit. These portrayals of a neutral, benevolent employer are nothing more than "fluff." Rather, the Company's actions are more telling. Smyrna had acquired union facilities in Piqua and Louisville. (TR. 1557, 878-79) The Piqua acquisition was contingent upon Smyrna continuing to recognize the Union, a fact Hollingshead conveniently left out of his direct examination. (TR. 1629) In Louisville, however, where Smyrna was not bound by such restrictions, there was no attempt to bargain with the striking Allied workers or resolve their issues. And upon purchasing Allied Concrete, Smyrna hired only about a half dozen employees out of 40 people from the entire facility, well below the threshold that would trigger recognition. (TR. 885, 904-05, 1172) Company witness Jonathan James, a former Teamster with Allied Concrete, remembers Smyrna's founder making it clear that employees would make more money if they remained non-union. (TR. 870-71, 906) And Jeff Hollingshead refused to offer a job to Christopher Call for a plant manager position. Call had filled out an employment application and disclosed his most recent employer as "Teamsters local 916/Prairie Materials." (G.C. 22) Hollingshead emphatically denied Call as a suitable candidate, stating "[n]o on him," even though the director of Smyrna's recruiting department had determined Call was one of "the good applications." (TR. 1626-27, 1636-38, 1648-49; G.C. 22)

An unlawful motive is strongly demonstrated by Company witnesses' repeated references

to the "culture" at Smyrna. James Goss told Ben Brooks "we've got a problem in Winchester." (TR. 1092) Chris Newell testified that when he took over Winchester "it was pathetic and an everyday struggle because of the attitudes of the Winchester employees." (TR. 1431) "They were pissed off that Aaron was gone." (TR. 1431) Newell reported what he heard about a "drivers only" meeting right away to Brooks because this type of meeting conflicted with the "we're all in this together" culture at Smyrna. (TR. 1415)

Smyrna attempts to twist these circumstances into its affirmative defense that it terminated the drivers "for cause." The Company cites to the employees' attitudes and their refusal to engage in certain work, namely refusing to travel to other facilities, especially Florence.[13] First, the Company has not proven that anyone refused work in Florence, or anywhere else. The drivers all testified that they discussed not wanting to go to Florence, and some of them stopped *volunteering* to go. (TR. 120-21, 123, 231-33, 545-48, 638-40, 679, 746, 843) The drivers talked about it, but "refusing was a strong word." (TR. 639) "[W]e just weren't going to volunteer." (TR. 639) Even Ben Brooks testified that "[Highley] never said they refused. He said they did not like to go." (TR. 1179) Refusing voluntary work is protected, concerted activity, however. *St. Barnabas Hosp.*, 334 NLRB 1000 (2001). "[I]t is well settled that where the duties that the employees refuse to perform are voluntary or discretionary, the refusal to perform them cannot be deemed a partial strike." *Id.* at 1011-12 (internal citations omitted)). Highley and the drivers consistently testified that Highley always solicited volunteers. But, if any of the drivers were told they had to go to Florence, they went. The fact that the employees always acquiesced, made their talk of refusing to go to Florence nothing more

[13] This same analysis should apply to Copher as well, inasmuch as the Company would argue Copher was terminated for the same reasons.

than a threat that the Company had no reason to believe would be carried out. *Ibid.* Even assuming the plan had been to, someday, refuse to go to a location when told, without concrete action, these were unexecuted plans that cannot be used as grounds for discharge. *Ibid.*; *Hotel Holiday Inn*, 259 NLRB 496, 500-501 (1981), enfd. 702 F.2d 268 (1st Cir. 1983) (employees' conduct protected despite union's plan to stage unprotected sit-down strike, because plan for unprotected activity was forestalled).

The shutdown of the Winchester facility was also contrary to Smyrna's past practice. Winchester had never been shut down for the winter. (TR. 735) James Goss told employees they would continue to get 40 hours through the winter. (TR. 284) Highley was instructed to tell new hires they would regularly get 40 hours, and Smyrna advertises this as one of their perks. (TR. 284-87, 316, 735). Additionally, Smyrna did not treat Winchester the same as it had other facilities it converted to on demand. In August 2019, the Brooks, Kentucky facility became on demand, but the drivers were transferred to Shepherdsville. (TR. 1216) And when the Somerset, Kentucky facility was converted to on demand, its drivers transferred to Nicholasville. (TR. 940-41, 1216) While one operator, Jason Means, was offered a transfer to another plant, this does not mean the Company's actions were lawful. (TR. 1130) First, a different driver asked to transfer and was refused. (TR. 1216) And the offer to Means was of no consequence since he was ultimately terminated with the remaining drivers. (TR. 657-663, G.C. 4)

Smyrna now claims it decided to close the Winchester plant because it was less efficient than other plants, even though Winchester had doubled its production from the prior year. (GC 26-28) The Company offered the accounting tool "EBITDA" as the reason for its decision, even though it never shared that metric with any of its plant managers who previously monitored their success by concrete yardage produced. (R. 9) The EBITDA difference for Winchester can

easily be explained by examining the hours spent assisting other facilities. Smyrna witnesses admitted that the EBITDA report did not account for the hours Winchester drivers spent at other facilities, helping those facilities increase their own yardage. (TR. 1485-87, 1528-29) Furthermore, Winchester is very rural compared to the other facilities and requires longer driving times. (TR. 38, 763, 410, 846, 1014, 1300, 1364-1365, 1652) And any "inefficiencies" did not just arise overnight. The only metric available to Highley as Winchester plant manager was concrete yardage, a report that showed Winchester was thriving. Smyrna took no action to correct this alleged "inefficiency" for nearly the nearly 18 months prior to employees demonstrating an interest in organizing. (TR. 763, 937-938, 1202, 1217, 1303-1304, 1378, 137, 1591-1593, 1600) *Cf. Armstrong Rubber Co. v. NLRB*, 849 F.2d 608 (6th Cir. 1988) (enforcing finding that after notice of a union representation petition, employer changed agreed-upon plan to cut four employees to cope with work slowdown and instead terminated the entire proposed unit).

Further, Smyrna's claims are contradicted by the fact that, apparently, Winchester's efficiency had improved as of December 2019. (TR. 937, 1208-09) And the Company's own metric – the EBITDA – showed that Winchester was still profitable. (R. 9) If the point of firing Highley and bringing in Goss and Newell was to "turn things around," and if, according to its own witnesses, the efficiency was improving, then why shut down the plant? It is also hard to believe that a large corporation like Smyrna decided to shut down a facility, especially a profitable one, within a matter of a few weeks. Smyrna kept the mechanics at Winchester; they were not overtly part of the campaign. And, in fact, since Winchester closed, the work at sister facilities has increased. In other words, the amount of work has not changed; it has simply been redistributed. The Company's reasons for the shutdown are a farse.

ii. Requiring employees to sign an overbroad severance agreement violated the Act.

Because the Winchester drivers were unlawfully terminated in retaliation for trying to form a union, Smyrna violated Section 8(a)(1) by conditioning the drivers' acceptance of four weeks' severance pay on the broad non-disparagement provision in the severance agreement. This clause prohibits employees from "speak[ing] unfavorably about [Smyrna]… to third parties or in public or otherwise tak[ing] any action or mak[ing] any comment whatsoever that would harm, injure, or potentially harm or injure the goodwill of [Smyrna]. . . ." (GC 3, 4, 10, 11, 20, 21) Such language proscribed their right, under Section 7 of the Act, to engage in mutual aid and protection by providing statements that would support claims by co-workers that Smyrna violated the Act – essentially insulating Smyrna from any such charges. See, *Shamrock Foods*, 366 NLRB No. 117, slip op. at 3 (June 22, 2018) (finding unlawful waiver prohibiting employee from, inter alia, "making disparaging remarks or tak[ing] any action now, or at any time in the future, which could be detrimental to the [employer]").

The Board will only find an employees' waiver of Section 7 rights lawful if it is narrowly tailored to the facts giving rise to the settlement. *Cf. S. Freedman & Sons, Inc.* 364 NLRB No. 82, slip op. at 1-2 (Aug. 25, 2016) (agreement offered to union steward in exchange for his reinstatement was lawful because the agreement only prohibited him from filing a grievance over the specific incident that led to his discharge and the confidentiality clause did not prevent him from discussing future discipline or pursuing grievances in litigation over unrelated matters); *Coca-Cola Bottling Co. of Los Angeles*, 243 NLRB 501, 502 (1979) (no violation where employer conditioned reinstatement on employee withdrawing or waiving any claims related to the particular discipline at issue and settlement agreement did not prevent charges concerning future incidents or prevent employee from engaging in other Section 7 activity). On the other

hand, settlement provisions that purport to broadly prevent employees from assisting with Board charges filed by other individuals are unlawful where an employer has already demonstrated its willingness to retaliate against employees for engaging in Section 7 activity. See, *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 3 n. 12 (waiver that would have required unlawfully discharged employee to waive Section 7 right to provide assistance to former coworkers, disclose information to the Board, or make disparaging remarks or take actions "detrimental" to the employer was unlawful), *enforced mem.* 779 F. App'x 752 (D.C. Cir. 2019). The "[f]uture rights of employees as well as the rights of the public may not be traded away in this manner." *Ishikawa Gasket America*, 337 NLRB 175, 175-76 (2001), enf'd 354 F.3d 534 (6th Cir. 2004).

The purported "savings" language of the non-disparagement provision, explicitly stating that it does not apply to "truthful report[s] to any government agency with oversight responsibility for [Smyrna]" does not mitigate its unlawful message. Participating in investigations conducted by the Board is notably absent from the listed exceptions. And such vague language hardly served to reassure employees that they could participate in a Board investigation without breaching the terms of their agreement. See e.g., *Metro Networks*, 336 NLRB 63, 66-67 (2001) (finding settlement provisions prohibiting discriminatees from communicating about the employer or aiding in claims "except as required by law" unlawful).

IV. CONCLUSION

The organizing campaign died upon Smyrna's firing of Copher and Highley. The drivers at Winchester were scared. As Company witness James Goss testified:

> Q [to Goss]: They were scared. And why do you think they were scared?
> A: Probably because they just got through getting rid of that Copher guy, and then they got rid of Aaron on Monday, so maybe they thought they could be next. (TR. 957)

The Company had (albeit, unlawfully) accomplished its goal of remaining union-free. But it was

also apparent that the union talk had not fully gone away, and Smyrna did not want to take any chances. Rather than face another campaign, Smyrna could fire everyone, force them to sign severance agreements that prohibited them from discussing what happened with each other or anyone else, and simply circumvent the problem by transferring work to sister facilities. This is exactly what Smyrna did. It is an egregious, and blatant, violation of the Act.

The Union requests the Judge find merit in all allegations and award the remedies requested in the General Counsel's Complaint, including reopening the Winchester location, reinstating all discharged employees, ordering a make-whole remedy, and a notice posting and reading.

Respectfully submitted,

/s/ David O'Brien Suetholz
David O'Brien Suetholz
Pamela M. Newport
Branstetter, Stranch & Jennings, PLLC
515 Park Avenue
Louisville, KY 40208
Tel: (502) 636-4333
Email: davids@bsjfirm.com
pamelan@bsjfirm.com

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the foregoing was on this 19th day of August, 2020, filed electronically with the NLRB and copies of same were sent via email to the following:

Zuzana Murarova
Counsel for General Counsel
NLRB, Region 9
zuzana.murarova@nlrb.gov

Kimberly Veirs
Mary Leigh Pirtle
Tim Garrett
Robert Horton
BASS BERRY & SIMS
kveirs@bassberry.com
mpirtle@bassberry.com
tgarrett@bassberry.com
bhorton@bassberry.com

Stephen A. Watring
AUMAN MAHAN & FURRY
saw@amfdayton.com

/s/ David O'Brien Suetholz
David O'Brien Suetholz
Pamela M. Newport